TABLE OF CONTENTS

Appendix Page

Judgment of
The U.S. Court of Appeals for the
Federal Circuit
entered January 11, 2005 ..... 1a

Initial Decision of
The Honorable Philip D. Reed,
Administrative Judge,
The Merit Systems Protection Board
entered April 8, 2004 ..... 3a

Opinion of
The U.S. Court of Appeals for the
Federal Circuit
(Docket No. 03-3006)
entered October 31, 2003 ..... 18a

Final Order of
The Merit Systems Protection Board
Re: Denying Petition and Cross
Petition for Review
(Docket No. SF-1221-01-1072-W-1)
entered August 5, 2002 ..... 24a

Initial Decision of
The Honorable Philip D. Reed,
Administrative Judge,
The Merit Systems Protection Board
(Docket No. SF-1221-01-1072-W-1)
entered October 3, 2001 ..... 29a

5 U.S.C. § 7701 ..... 50a

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record.

United States Court of Appeals for the Federal Circuit

04-3312

REGINALD L CYRUS,

Petitioner,

v.

DEPARTMENT OF THE AIR FORCE,

Respondent.

[ENTERED: January 11, 2005]

JUDGMENT

ON APPEAL from the MERIT SYSTEMS PROTECTION BOARD

In CASE NO(S). SF1221010172-M-1

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

PER CURIAM (LOURIE, CLEVENGER, and SCHALL, Circuit Judges):

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

DATED JAN 11 2005 /s/ Jan Horbaly
JAN HORBALY, CLERK

ISSUED AS A MANDATE: MAR 4 2005

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

REGINALD L. CYRUS,
Appellant,

DOCKET NUMBER
SF-1221-01-0172-M-1

v.

DEPARTMENT OF
THE AIR FORCE,
Agency.

DATE: April 8, 2004

[ENTERED: April 8, 2004]

Joseph D. Gebhardt. Esquire, Washington, D.C., for the appellant.
Warren Seidel. Esquire, Edward AFB, California, for the agency.

BEFORE
Philip D. Reed
Administrative Judge

INITIAL DECISION

INTRODUCTION

On December 11, 2000, the Board denied the appellant's petition for review of a previous appeal, but forwarded the matter to this office "for docketing as a timely filed individual right of action [IRA] appeal." *Cyrus v. Department of the Air Force*, No. SF-1221-00-0496-W-1, at 2 (December 11, 2000). Accordingly, the appeal was assigned the new docket number SF-1221-01-0172-1-1.

Also pending at that time was another IRA appeal involving the same parties, No. SF-1221-01-0092-W-1. On

January 30, 2001, I issued an initial decision dismissing it as untimely filed. The appellant filed a petition for review of that decision, which was denied by the Board in a final order dated December 13,2001.

Both of the appellant's prior appeals presented facts and issues identical to those raised in this one. Therefore, I incorporated the records of those actions into the record of this appeal. *See* Initial Appeal File in No. SF-1221-01-0172-W-l ("IAF-172"), Tab 3.

Initially the appellant requested a hearing. *See* Initial Appeal File in No. SF-1221-00-0496-W-1 ("IAF-496), Tab 1, at 5. Thereafter, he was ordered to show cause why some or all of his claims should not be dismissed without a hearing, because he had failed to make non-frivolous allegations which, if proven, would establish that Board jurisdiction exists. After the record on jurisdiction had closed, I ruled that the appellant was entitled to a jurisdictional hearing on some, but not all of his allegations, and reopened the record for that purpose. As for the rest, I ruled that they would be dismissed without a hearing, for lack of jurisdiction. The appellant objected to the narrowed scope of the proceeding, and when this objection was overruled, he withdrew his request for a hearing.[1] Accordingly, my initial decision in docket number SF-1221-01-0172-W-I was based on the

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[1] IAF-172, Tabs 6, 13, 15, 20, 29. In his response to my show cause order the appellant attempted to relitigale claims that were previously dismissed for lack of jurisdiction in appeal number SF-1221-00-0496-W-I; i.e., a direct appeal of an alleged reduction in pay, and an alleged demotion by reduction in force. He also sought to raise claims of illegal discrimination on the basis of age, and reprisal for filing a grievance. IAF-172, Tabs 13, 15. I declined to hear these claims because neither one can be litigated in an IRA appeal. *Id.*, Tab 20, at 1; *Marren v. Department of Justice*, 51 M.S.P.R. 632 (1991), *aff'd.* 980 F.2d 745 (Fed. Cir. 1992) (Table); *Thomas v. Department of the Treasury*, 77 M.S.P.R. 224, 230-31 (1998), *overruled on other grounds by Ganski v. Department of the Treasury*, 86 M.S.P.R. 32 (May 4, 2000). Thus, these additional claims were dismissed. *See* IAF-172, Tab 33 (initial decision), at 2 n.l.

documentary record. *See* IAF-172, Tab 33 (initial decision or "ID").

In my initial decision I found that the actions covered in this appeal took place as alleged, and they were "personnel actions" within the meaning of 5 U.S.C. § 2302(a)(2), that occurred after the effective date of the WPA. Those actions were (1) reassignment from the position of Computer Specialist, NH-0334-III, to that of Computer Specialist (Programmer Analyst), NH-0334-III, in or about May 2000; (2) issuance of a lowered "contribution score" for 1999, allegedly resulting in loss of pay; and (3) denial of a further pay increase that the appellant allegedly would have received in April 2000. *Id.*, at 10. I also found that the appellant had exhausted his remedies before the Office of Special Counsel (OSC) with respect to those actions. *Id.*, at 11.

The appellant alleges that he made protected disclosures in 1994 and 1995, concerning alleged timekeeping irregularities and violations of selection procedures, respectively; and in 1999 concerning the agency's legal authority to implement the demonstration project. In my initial decision I found that his allegations would, if proven, show that his disclosures of 1994 and 1995 were protected, *id.*, at 5, citing IAF-172, Tab 13 ("Appellant's Response To Order to Show Cause" dated March 26, 2001), at 2, and *id.*, Tab 19, ("Appellant's Amended Motion to Compel Discovery"), at 2-3; however, they would not show that he made any protected disclosure in 1999. ID, at 5-6.

I found further that the appellant did not exhaust his OSC remedy with respect to his 1994 disclosures regarding timekeeping. *Id.*, at 9. Hence, he was entitled to a jurisdictional hearing only with respect to the claim that his 1995 disclosure concerning violations of selection procedures contributed to any of the three personnel actions

in question. *Id.*, at 10. Since a hearing had been waived I determined, based on the written record, that the 1995 disclosure took place, but the appellant had failed to prove that it was protected under the WPA. Accordingly, in reliance on *Geyer v. Department of Justice*, 63 M.S.P.R. 13, 16-17 (1994), I found that jurisdiction did not exist, and dismissed the appeal on that basis. ID, at 13. I also found that even if the Board had jurisdiction in the matter, I would deny corrective action because the appellant failed to show that his 1995 disclosures contributed to the actions in question. *Id.*, at 13-15.

The appellant filed a petition for review of my initial decision with the full Board, which denied his petition on August 5, 2002. He then filed a petition for review with the U.S. Court of Appeals for the Federal Circuit, which affirmed in part, reversed in part, and remanded the case to the Board for further proceedings. Specifically, the Court "affirm[ed] the Board's ruling that the 1999 disclosures did not meet the requirements for protected disclosures under the WPA. We also affirm the ruling that the 1995 disclosure, even if protected, did not cause or contribute to the personnel actions taken against Mr. Cyrus in 2000." *Cyrus v. Department of the Air Force*, 80 Fed.Appx. 673, 675-76 (Fed.Cir., Oct 31, 2003). However, it found that the appellant had, in fact, exhausted his OSC remedy with respect to his 1994 disclosures regarding timekeeping. Thus, it reversed my ruling that the Board lacked jurisdiction on that ground, and remanded the appeal to the Board "so that it may address [the appellant's] allegations with respect to the timekeeping disclosure." *Id.*, at 675-76. The Board then remanded the matter to this office for further proceedings in accordance with the court's opinion.

The appellant withdrew his request for a hearing only after I had excluded his timekeeping disclosure from consideration. Therefore, on remand I reinstated his request

for a hearing, with the understanding that he was free to withdraw it again if he wished to do so. Remand File (RF), Tab 2, at 4. I also informed him of his burden of proof regarding the issue of jurisdiction, which has changed since I issued my prior initial decision, and ordered him to provide evidence and argument showing that jurisdiction exists. *Id.* Both parties filed timely responses and the record on jurisdiction is now closed.

For reasons explained below, the allegations that were remanded to the Board are DISMISSED for lack of IRA jurisdiction, without a hearing.

ANALYSIS AND FINDINGS

Under current law, the Board has jurisdiction if the appellant makes non-frivolous allegations which, if proven, would show that an appealable action or claim exists, and supports them by affidavits or other evidence. *See Dick v. Department of Veterans Affairs*, 290 F.3d 1356, 1361 (Fed.Cir., 2002); *Marcino v. U.S. Postal Service*, 344 F.3d 1199, 1204 (Fed.Cir., 2003). To determine whether this standard is met, "the Board may properly consider the government's evidence as well as the employee's. In that respect, the standard is analogous to that for summary judgment. (...) Non-frivolous allegations cannot be supported by unsubstantiated speculation in a pleading submitted by [the employee]." *Dorrall v. Department of the Army*, 301 F.3d 1375, 1380-81 (Fed.Cir. 2002). Absent non-frivolous allegations, there is no right to a hearing on the threshold issue of jurisdiction. *Dick*, 290 F.3d at 1361-62.

As noted in my initial decision dated October 3, 2001, as of that date the Board had not adopted the Court's jurisdictional formulation for IRA appeals, as set forth in *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367 (Fed.Cir., 2001). *See* ID, at 4 n.9. That is no longer the case.

The Board now holds that in order to establish jurisdiction over an IRA appeal, the appellant must show that he has exhausted his administrative remedies before the OSC and makes nonfrivolous allegations – i.e., allegations supported by at least some evidence – that: (1) He engaged in whistleblowing activity by making a disclosure protected under 5 U.S.C. § 2302(b)(8), and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action. *Rusin v. Department of the Treasury*, 92 M.S.P.R. 298, 304 (September 4, 2002), *citing Yunus*, 242 F.3d at 1371.

In this regard, the Court found that the appellant exhausted his OSC remedy with respect to his alleged, timekeeping disclosure of 1994, and I have previously found that he did so with respect to all three actions under appeal. I have also found that all of those actions were "personnel actions" for WPA purposes. Pursuant to the "law of the case" doctrine I incorporate and apply all of these findings herein. *Garcia v. U.S. Postal Service*, 78 M.S.P.R. 425, 426 (1998), *citing Peartree v. U.S. Postal Service*, 66 M.S.P.R. 332, 339 (1995). Hence, to complete his jurisdictional showing, the appellant must make non-frivolous allegations, supported by at least some evidence, showing that his timekeeping disclosure was protected and that it was a contributing factor in one or more of those actions. *See Rusin*, 92 M.S.P.R. at 304; *Marcino*, 344 F.3d at 1204.

Protected Disclosure

On remand, the appellant submits his declaration under penalty of perjury, in which he describes his timekeeping disclosure as follows:

> In late 1994 or early 1995 I became aware that Program Manger Rory LuBould (a co-worker) was collecting an [agency] salary but

> was never at work because he was working full-time at a private-sector, outside job. (I discovered this after I had a difficult time finding Mr. LuBould when I needed a technical requirement clarification for the B-1 Upgraded Support System). I informed Deputy Civilian Personnel Officer Luke Pope of this situation. After I brought this practice - which I believed to be illegal and a gross waste of government funds - to the attention of the [agency] through Mr. Pope, the [agency] investigated Mr. LuBould's conduct, with the result that he resigned.

RF, Tab 4, appellant's declaration ("App.Dec") at 1.

I find that this provides some evidence that such a disclosure occurred, and that a disinterested observer with knowledge of the essential facts known to or readily ascertainable by the appellant could reasonably conclude that such actions constituted a violation of law, rule or regulation; i.e., performing private work on government time. The appellant has therefore made non-frivolous allegations which, if proven, would show that he made a protected disclosure. *See LaChance v. White*, 174 F.3d 1378, 1381 (Fed.Cir., 1999), *cert. denied*, 120 S. Ct. 1157 (U.S., 2000); *Marcino*, 344 F.3d at 1204.

Contributing Factor

To prove that his alleged timekeeping disclosure was a contributing factor in any of the personnel actions in-question, the appellant must show, inter alia, that the official taking the action had actual or constructive knowledge of the disclosure. *Easterbrook v. Department of Justice*, 85 M.S.P.R. 60, 65-66 (2000).

Undisputed evidence of record shows that the persons who took action (1) were Gary Johnson and Jan Taylor, *see* IAF-172, Tab 30, Agency Exhibits 4, 5; and those who took action (2) were Tim Chalfant and 7 other members of a "sub-pay panel." *Id.*, Agency Exhibits 4, 6-12. As to action (3), demonstration project chief Brandt Taylor states in an affidavit that had the appellant remained a general schedule employee he would have received a within-grade increase in April 2000; however, as a member of the demonstration project he was no longer entitled to such increases; thus, the loss of a pay increase in April 2000 did not arise out of any separate decision, but was a consequence of the demonstration project itself. *Id.*, Agency Exhibit 14, at 2. Hence, it does not appear that any individual "took" action (3).

In support of his allegation that the acting officials knew of his timekeeping disclosure the appellant states:

> Mr. LuBould was supervised at the time of my disclosure to Mr. Pope by Col. Gail Nusz and Mr. Robert Sakahara, and Mr. Timothy Chalfant had started his management career in this chain of command. I believe that Col. Nusz and Mr. Chalfant knew about and were embarrassed by the disclosure of this illegal scam and Mr. LuBould's subsequent resignation.

App.Dec, at 1-2 (footnote omitted, stating that "Col. Nusz later changed her last name to Dodson.")

The appellant provides no direct evidence to support this belief. Instead, he relies on circumstantial evidence, such as the fact that Mr. Chalfant once worked in the same chain of command as Mr. LuBould, and Col. Nusz - who was not one of the acting officials – was one of Mr.

LuBould's direct supervisors. He also states that after he made his timekeeping disclosure to Mr. Pope, Col. Nusz "disparaged my work ethic" in front of Mr. Chalfant and others, even though she "had no legitimate reason" to do so; and when she was no longer his supervisor he again "received outstanding performance ratings, as I had during my first 20-plus years with the Air Force, before I worked for Col. Nusz." The appellant states further that in late 1997 or early 1998 he "was once again in [Col. Nusz'] chain of command[,]" and based on their interactions "it was clear to me that she still bore a grudge against me for my disclosure about Mr. LuBould"; that in mid-1999 Col. Nusz sat on a panel that assessed his performance on an advisory basis; and "[d]espite my history of excellent performance, I received an unfavorable review from this 'mock' review board, which questioned my communications skills and indicated that I was 'doing [my] own thing.'" *Id.*, at 2-3. Finally, the appellant states that in January 2000 he received an unsatisfactory assessment from "the real pay panel," which was unfair and "presumably influenced" by the "mock" panel "because the two panels were made of up relatively high level managers who worked together and issued similar inaccurate results." *Id.*, at 3. He continues:

> Also B-1 Program Manager Tim Chalfant, formerly Col. Nusz's subordinate and who I believe had been Mr. LuBould's supervisor, was actually a member of the final pay panel that rated me. I believe that Col. Nusz and Mr. Chalfant communicated their past experiences and biases against me to the other pay panel members, and that these experiences adversely affected my scores, particularly in the subjective area of "communications." My supervisor, Archie

> Amos, testified in his deposition that Mr. Chalfant made especially negative comments about me in the pay panel deliberations.

Id., at 3-4.

In short, the appellant asks the Board to infer knowledge of his protected disclosures solely from the fact that Col. Nusz, and perhaps Mr. Chalfant, once supervised Mr. LuBould; that Col. Nusz later made statements critical of the appellant's performance; and both she and Mr. Chalfant sat on panels that found his performance less than fully satisfactory. Even assuming, without finding, that this finding was erroneous, it provides no genuine support for the allegation that Mr. Chalfant, who participated in action (2), had actual knowledge of the appellant's timekeeping disclosure; for the error could be explained in myriad way other than reprisal for whistleblowing. As for actions (1) or (3), the appellant has not even alleged such knowledge on the part of any acting official, much less provided evidence of that fact. Hence, he has failed to make nonfrivolous allegations showing that any acting official had actual or constructive knowledge of his alleged timekeeping disclosure, as he must to show that it was a contributing factor in the actions themselves. *See Eosterbrook*, 85 M.S.P.R. at 65-66; *Marcino*, 344 F.3d at 1204. He has therefore failed to show that jurisdiction exists, and the appeal must be dismissed without a hearing. *Rusin*, 92 M.S.P.R. at 304; *see Marcino*, 344 F.3d at 1202 n.l.

DECISION

The appeal is DISMISSED.

FOR THE BOARD:

/s/ Philip D. Reed
Philip D. Reed
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **May 13, 2004**, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.,
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), or personal or commercial delivery. A petition for review may also be filed by electronic mail (e-mail) if the petitioning party makes an election under 5 C.F.R. § 1201.5(f), which requires a written statement of the election that includes the e-mail address at which the party agrees to receive service. Such an election may be filed by e-mail at the following address: e-FilingHQ@mspb.gov.

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. The date of filing by mail is determined by the postmark date. The date of filing by fax or e-mail is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. If the petition is filed by e-mail, and the other party has elected e-Filing, including the party in the address portion of the e-mail constitutes a certificate of service.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent by regular mail this day to each of the following:

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Reginald L. Cyrus
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Washington, DC 20415

April 8, 2004
(DATE)

/s/ Larry Hunt
Larry A. Hunt

This case was not selected for publication in the Federal Reporter.

NOTE: Pursuant to Fed.Cir.R. 47.6, this order is not citable as precedent. It is public record.

Please use FIND to look at the applicable circuit court rule before citing this opinion. Federal Circuit Rule 47.6. (FIND CTAF Rule 47.6.)

United States Court of Appeals,
Federal Circuit.

Reginald L. CYRUS, Petitioner,

v.

DEPARTMENT OF THE AIR FORCE, Respondent.

No. 03-3006.

DECIDED: Oct. 31, 2003.
[ENTERED: October 31, 2003]

Before MAYER, Chief Judge, CLEVENGER, and SCHALL, Circuit Judges.

DECISION

SCHALL, Circuit Judge.

Reginald L. Cyrus petitions for review of the final decision of the Merit Systems Protection Board ("MSPB" or "Board") that dismissed his individual right of action ("IRA") appeal. *Cyrus v. Dep't of the Air Force,* No. SF-1221-01-0172-W-1, 92 M.S.P.R. 226 (M.S.P.B. Aug. 5, 2002) (*"Final Decision"*). Mr. Cyrus sought corrective action for personnel actions taken by the Department of the Air Force ("Air

Force"), which he alleged were in retaliation for a series of protected statements made during his employment. Mr. Cyrus claimed that the Air Force's actions violated the Whistleblower Protection Act ("WPA"), 5 U.S.C. § 2302(b)(8). We *affirm in-part, reverse in-part,* and *remand.*

DISCUSSION

I.

Mr. Cyrus is a civilian computer specialist employed at Edwards Air Force Base ("Edwards AFB") in California. He alleges that protected disclosures he made in 1994, 1995, and 1999 caused negative personnel actions-pay raise denials and a reassignment-to be taken against him.

According to Mr. Cyrus, his first protected disclosure occurred in 1994, when he verbally reported to his supervisor that a colleague was improperly drawing an Air Force salary while working full time in the private sector (the "timekeeping disclosure" or the "1994 disclosure"). In 1995, Mr. Cyrus contends, he made a second protected disclosure, suggesting that Air Force procedures and federal regulations were violated in the advertising and hiring actions of the B1 Support group manager (the "B1 disclosure" or the "1995 disclosure"). Finally, Mr. Cyrus claims that, in 1999, he criticized Edwards AFB's adoption of the Contribution-based Compensation and Appraisal System ("CCAS"), a pay system in which employees are paid based on their contribution to the overall mission of the base, rather than on individual performance. CCAS utilizes a panel of several members ("pay panel") to evaluate whether an employee is "above the rail," such that his or her current pay rate exceeds his or her contribution to the Air Force base. If the employee is judged overcompensated, he or she is denied a pay raise. Mr. Cyrus objected to the new compensation system. Through a series of letters to

Edwards AFB leadership (the "1999 disclosures"), he questioned the legal authority of the pay panel to deny raises and the value of the CCAS program to taxpayers.

In January of 2000, Mr. Cyrus's performance was evaluated by a CCAS pay panel, which determined that his contribution relative to rate of pay was "above the rail." He was therefore denied a base pay increase of 3.8% and, later, a "step increase" in his pay rate. In May of 2000, Mr. Cyrus's position was eliminated and he was reassigned to a new unit. He remained a computer specialist, however, and his pay rate and grade were not reduced by the reassignment. Mr. Cyrus nonetheless complains that the reassignment was disadvantageous, and was in part in retaliation for his protected disclosures.

Following the pay raise denial and his reassignment, Mr. Cyrus filed a complaint with the Office of Special Counsel ("OSC"). He alleged that the 1994, 1995, and 1999 disclosures led to his unfavorable CCAS score, the resulting pay raise denial, and ultimately, the elimination of his position and reassignment. After conducting an investigation, OSC found that although the timekeeping disclosure and the B1 disclosure were probably protected under the WPA, the passage of several years between the disclosures and the personnel actions at issue sufficiently severed any causal relationship. OSC did not find the 1999 disclosures to be protected disclosures under the WPA.

Mr. Cyrus timely appealed to the Board. On October 3, 2001, the administrative judge ("AJ") to whom the appeal was assigned issued an initial decision in the case. *Cyrus v. Dep't of the Air Force*, No. SF-1221-01-0172-W-1 (M.S.P.B. Oct. 3, 2001) ("*Initial Decision*"). The AJ ruled that the 1999 disclosures did not constitute protected disclosures as defined by the WPA; instead, he held, they merely "amounted to a debate of law, grounded in facts that were

widely known." *Id.* at 17. While the AJ did suggest that the 1994 and 1995 disclosures, if proven, would constitute protected disclosures, *Id.* at 16, he held that Mr. Cyrus had failed to exhaust his remedies before the OSC with respect to the 1994 disclosure and therefore could not proceed on an IRA appeal with respect to that disclosure. *Id.* at 18-20. The AJ ruled that Mr. Cyrus had not disclosed sufficient information to permit OSC to conduct an investigation. Thus, the timekeeping claim was dismissed for want of jurisdiction for failure to exhaust.

This dismissal left the B1 disclosure as the only remaining issue before the AJ. Because Mr. Cyrus had not convincingly shown that the officials taking the personnel action in 2000 possessed either actual or constructive knowledge of the 1995 disclosure, the AJ held that Mr. Cyrus had not established that the disclosure contributed to any of the personnel actions at issue. *Id.* at 25- 26.

The AJ's Initial Decision became the final decision of the MSPB when the Board denied Mr. Cyrus's petition for review for failure to meet the criteria for review set forth at 5 C.F.R. § 1201.115. *See Final Decision,* at 1-3. An appeal to this court followed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(9).

II.

We must affirm the Board's decision unless we find that it was (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule or regulation having been followed; or (3) unsupported by substantial evidence. 5 U.S.C. § 7703(c); *Serrao v. Merit Sys. Prot. Bd.*, 95 F.3d 1569, 1573 (Fed.Cir.1996).

Mr. Cyrus challenges the Board's decision in connection with all of his alleged protected disclosures. We affirm the Board's ruling that the 1999 disclosures did not meet the requirements for protected disclosures under the WPA. We also affirm the ruling that the 1995 disclosure, even if protected, did not cause or contribute to the personnel actions taken against Mr. Cyrus in 2000. The Board's decision on these points is free of legal error and supported by substantial evidence. For the reasons that follow, however, we reverse the Board's ruling that it lacked jurisdiction over the appeal insofar as it related to the 1994 disclosure.

We agree that, in order for the Board to have jurisdiction, Mr. Cyrus must have exhausted his administrative remedies by presenting the 1994 disclosure to OSC for a preliminary investigation. *See Initial Decision,* at 7- 8 (citing *Ward v. Merit Sys. Prot. Bd.,* 981 F.2d 521, 526 (Fed.Cir.1992)). Where we differ with the Board is in its conclusion that the exhaustion requirement was not met with respect to that disclosure. It is clear from the record that Mr. Cyrus did exhaust his OSC remedy and that, accordingly, there was no bar to the Board's exercise of jurisdiction. On May 15, 2000, Mr. Cyrus wrote to OSC: "In late 1994 and 1995 I made two verbal reports to Mr. Luke Pope for his agency to investigate. The first item involved a person's time at work...." Upon completion of its investigation, in its notice to Mr. Cyrus on the closing of his file, OSC specifically acknowledged the timekeeping disclosure, and noted that it likely met the requirements for a protected disclosure.

The foregoing exchange between Mr. Cyrus and OSC makes it clear that Mr. Cyrus properly exhausted his administrative remedies. We therefore reverse the decision of the Board that it lacked jurisdiction insofar as Mr. Cyrus's appeal related to the 1994 disclosure. The case is remanded

to the Board so that it may address Mr. Cyrus's allegations with respect to the timekeeping disclosure.

80 Fed.Appx. 673, 2003 WL 22495 842 (Fed.Cir.)

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

REGINALD L. CYRUS,
Appellant,

DOCKET NUMBER
SF-1221-01-0172-W-1

v.

DEPARTMENT OF
THE AIR FORCE,
Agency.

DATE: AUG 5 2002

[ENTERED: August 5, 2002]

Steven E. Brown, Esquire, Westlake Village, California, for the appellant.
Warren A. Seidel, Esquire, Edwards AFB, California, for the agency.

BEFORE

Susanne T. Marshall, Acting Chairman
Beth S. Slavet, Member

FINAL ORDER

The appellant has filed a petition for review and the agency has filed a cross petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as these only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review and the cross petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the

United States Code, section 7703 (5 U.S.C. § 7703). You may read this law as well as review the Board's regulations and other related material at our web site, http://www.mspb.gov.

FOR THE BOARD: /s/
Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.

CERTIFICATE OF SERVICE

I certify that this ORDER was sent today:

By certified mail to:

Steven E. Brown, Esq.
850 Hampshire Road
Suite G
Westlake Village, CA 91361-2800

By regular mail to:

Reginald L. Cyrus
9748 Irene Avenue
California City, CA 93505

Warren A. Seidel, Esq.
AFFTC/JA
Department of the Air Force
1 South Rosamond Boulevard
Edwards AFB, CA 93524

Kenneth L. Bates
U.S. Office of Personnel Management
Employee Relations Division
1900 "E" Street, N.W., Room 7412
Washington, DC 20415

Merit Systems Protection Board
San Francisco Regional Office
250 Montgomery Street, Suite 400
San Francisco, CA 94104-3401

By hand to:

Office of the Special Counsel
1730 M Street, N.W.
Suite 201
Washington, DC 20036-4505

August 5, 2002
(Date)

/s/ Marie Warcholak
Marie Warcholak
Legal Assistant

Washington, DC

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

REGINALD L. CYRUS,
Appellant,

DOCKET NUMBER
SF-1221-01-0172-W-1

v.

DEPARTMENT OF
THE AIR FORCE,
Agency.

DATE: October 3, 2001

[ENTERED: October 3, 2001]

Steven E. Brown, Esquire, Westlake Village, California, for the appellant.
Warren A. Seidel, Esquire, Edwards AFB, California, for the agency.

BEFORE
Philip D. Reed
Administrative Judge

INITIAL DECISION

INTRODUCTION

On December 11, 2000, the Board denied the appellant's petition for review of a previous appeal, but forwarded the matter to this office "for docketing as a timely filed individual right of action [IRA] appeal." *Reginald L. Cyrus v. Department of the Air Force*, No. SF-1221-00-0496-W-1, at 2 (December 11, 2000) ("Final Order"). Accordingly, the appeal was assigned the new docket number that appears above.

Also pending at that time was another IRA appeal involving the same parties, No. SF-1221-01-0092-W-1. On January 30, 2001, I issued an initial decision dismissing it as untimely filed.[1] The appellant filed a petition for review of that decision, on which the Board has not yet ruled.

Both of the appellant's prior appeals present facts and issues identical to those raised in this one. Therefore, at the outset I incorporated the records of those actions into the record of this appeal.[2]

Initially the appellant requested a hearing.[3] Thereafter, he was ordered to show cause why some or all of his claims should not be dismissed without a hearing, because he had failed to make non-frivolous allegations which, if proven, would establish that Board jurisdiction exists. *See Embree v. Department of the Treasury*, 70 M.S.P.R. 79, 84 (1996). After the record on jurisdiction had closed, I ruled that the appellant was entitled to a jurisdictional hearing on some, but not all of his allegations, and reopened the record for that purpose. As for the rest, I ruled that they would be dismissed without a hearing, for lack of jurisdiction. The appellant objected to the narrowed scope of the proceeding, and when this objection was overruled, he

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[1] Initial Appeal File in No. SF-1221-01-0092-W-1 ("IAF-092"), Tab 15

[2] Initial Appeal File in No. SF-1221-01-0172-W-1 ("IAF-172"), Tab 3.

[3] Initial Appeal File in No. SF-1221-00-0496-W-1 ("IAF-496), Tab 1, at 5.

withdrew his request for a hearing.[4] Accordingly, the decision that follows is based on the documentary record.

For the reasons that follow, the appeal is DISMISSED for lack of IRA jurisdiction.

ANALYSIS AND FINDINGS

The appeal was timely filed.

Under 5 U.S.C. § 1214(a)(3), an IRA appeal may be filed within 60 days after the Office of Special Counsel (OSC) provides written notice to the appellant that it is terminating its investigation; or if no such notice has issued, 120 days after the appellant sought corrective action from OSC. *Id.*

The Board's order forwarding the matter to the regional office rests on the assumption that when the order was issued, 120 days had passed without notice from OSC that it was terminating its investigation.[5] This is incorrect. The appellant sought corrective action from OSC on May 22, 2000.[6] Less than 120 days later, on August 29, 2000, OSC

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[4] IAF-172, Tabs 6, 13, 15, 20, 29. In his response to my show cause order the appellant attempted to relitigate claims that were previously dismissed for lack of jurisdiction in No. SF-1221-0496-W-1; i.e., a direct appeal of an alleged reduction in pay, and an alleged demotion by reduction in force. He also sought to raise claims of illegal discrimination on the basis of age, and reprisal for filing a grievance. IAF-172, Tabs 13, 15. I declined to hear these claims because neither one can be litigated in an IRA appeal. *Id.*, Tab 20, at 1; *Marren v. Department of Justice*, 51 M.S.P.R. 632 (1991), *aff'd*, 980 F.2d 745 (Fed. Cir. 1992) (Table); *Thomas v. Department of the Treasury*, 77 M.S.P.R. 224, 230-31 (1998), *overruled on other grounds by Ganski v. Department of the Treasury*, 86 M.S.P.R. 32 (May 4, 2000). Thus, these additional claims are dismissed and I do not provide the appellant with mixed-case appeal rights.

[5] Final Order, at 2.

[6] IAF-496, Tab 1, block 41.b).

issued written notice that it was terminating its investigation.[7] The Board's Final Order is dated December 11, 2000. Thus, the 120-day rule does not apply, and to be timely the appellant was required to have an appeal on file within 65 days of OSC's closure notice. *See* 5 C.F.R. § 1209.5(a) (interprets statutory time limit as 65 days after date of notice letter).

By the same token, when OSC terminated its investigation, appeal No. SF-1221-00-0496-W-1 was still pending on petition for review. Thus, to the extent that claims raised in that appeal are the same as those presented to OSC, I find that the Board properly treated them as timely filed. *Cf. Davis v. Small Business Administration*, 74 M.S.P.R. 281, 288-89 (1997).

The appellant made non-frivolous claims which, if proven, would show that the Board has jurisdiction over some, but not all of the matters alleged.

Pursuant to the Board's Final Order, the scope of this appeal is limited to "matters in [*the appellant's*] initial appeal [*No. SF-1221-00-0496-W-1*] that could be within the Board's jurisdiction as part of an individual right of action appeal but were prematurely before the Board at the time of the initial decision... ."[8]

As to those matters, the appellant bears the burden of establishing that the Board has IRA jurisdiction by preponderant evidence. *See* 5 C.F.R. § 1201.56(a). To do so, he must show that (1) He made, or was closely associated with someone who made a disclosure protected under 5 U.S.C. § 2302(b)(8), i.e., a disclosure of information that was reasonably believed to evidence a violation of law, rule, or

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[7] IAF-0092, Tab I.

[8] Final Order, at 2.

regulation, gross mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety; (2) the agency took or failed to take, or threatened to take or fail to take, a "personnel action" as defined in 5 U.S.C. § 2302(a)(2) after the effective date of the Whistleblower Protection Act (WPA); and (3) the appellant has exhausted his remedies before OSC.[9] *Geyer v. Department, of Justice*, 63 M.S.P.R. 13, 16-17 (1994).

Disclosures

In documents attached to his initial appeal, the appellant stated as follows: "In 1994 and 1995 I made two verbal reports to Mr. Luke Pope [of the Civilian Personnel Office] for his agency to investigate. The first item involved a person's time at work and the second issue involved a personnel action at the Bl Support Group. (...) In 1999 I questioned the legality of the Edwards Demonstration Project. I researched 5 USC, Chapter 47, Section 4703(b), items J, 1, 2, 3, and 4, the 1990 Pay Comparability Act and the 1989 Ethics Reform Act... and based on my research, posed several questions to the General and Mr. Savena," also of the Civilian Personnel office.[10]

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[9] The Board's reviewing Court has adopted a different approach. In *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367 (Fed. Cir. Mar. 22, 2001), the U.S. Court of Appeals for the Federal Circuit held that "the Board has jurisdiction over an IRA appeal if the appellant has exhausted his administrative remedies before the OSC and makes 'non-frivolous allegations' that (1) he engaged in whistleblowing activity by making a protected disclosure under 5 U.S.C. § 2302(b)(8), and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action as defined by 5 U.S.C. § 2302(a)." *Id.*, at , 1371-72. The Board has not yet adopted this theory. I therefore apply *Geyer* to this appeal, but also explain below why I would reach the same result under *Yunus*.

[10] IAF-496, Tab 1, attachments at 12-13 (letter dated May 15, 2000); *id.*, petition for appeal at blocks 39.b., 39.c).

During subsequent proceedings I found that the appellant had stated facts which, if proven, would establish that protected disclosures occurred with respect to his alleged disclosures of 1994 and 1995, concerning alleged timekeeping irregularities and violations of selection procedures, respectively.[11] *See Gatiski v. Department of the Interior*, 86 M.S.P.R. 32, 35-36 (2000); *Kraushaar v. Department of Agriculture*, 87 M.S.P.R. 378, 382-85 (2000).[12]

As for his 1999 complaints concerning the legality of the demonstration project: These were made in letters dated October 9, 1999 and November 10, 1999, to Mr. Savena and Major General Richard Reynolds, respectively, in which the appellant questioned the source of the agency's legal authority to exempt employees of the demonstration project from the general pay increase that was received by federal employees outside the project in January 2000.[13] The agency responded with an opinion letter, discussing his arguments and concluding that they had no merit.[14] Even if proven, I found that this would not constitute a "disclosure" for WPA purposes; rather, it amounted to a debate of law, grounded in facts that were widely known. *See Meuwissen v. Department of the Interior*, 234 F.3d 9, 12-13 (Fed. Cir. 2000); *Huffman v. Office of Personnel Management*, No. 00-3184, *slip op.* at 11-12, 12 n.2 (Fed. Cir. August 15, 2001). A hearing was therefore denied as to the appellant's alleged

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[11] IAF-172, Tab 20, at 3.

[12] *Id., citing id.*, Tab 13 ("Appellant's Response To Order to Show Cause" dated March 26, 2001), at 2. *See also* IAF-172, Tab 19, ("Appellant's Amended Motion to Compel Discovery"), at 2-3.

[13] IAF-496, Tab 1, attachment sheets at 75-77.

[14] *Id.*, at 83-84.

disclosures concerning the legality of the demonstration project.[15]

Actions

The actions raised in the appellant's initial appeal were (1) a reassignment from the position of Computer Specialist, NH-0334-III, to that of Computer Specialist (Programmer Analyst), NH-0334-III, in or about May 2000; (2) a lowered "contribution score" for 1999, which allegedly resulted in the loss of "the Congressional and Presidential Award of 3.8% pay increase for the year 2000 that all other Federal employees did receive"; and (3) denial of a further pay increase, that he allegedly would have received in April 2000.[16]

Initially I found that, if proven, a reassignment would certainly constitute a "personnel action" for WPA purposes, under 5 U.S.C. § 2302(a)(2)(A)(iv); and so, arguably, would denial of two pay increases, insofar as both are "decision[s] concerning pay [or] benefits... ." 5 U.S.C. § 2302(a)(2)(A)(ix). To the extent that the appellant's "contribution score" constituted a performance evaluation, and the appellant sought to challenge its merits, I found that this would ordinarily constitute a covered personnel action under 5 U.S.C. § 2302(a)(2)(A)(viii) ("a performance evaluation under chapter 43" of title 5, United States Code). However, the appellant is covered under a demonstration project, which could be exempted from Chapter 43 if the agency and the Office of Personnel Management (OPM) agree to do so. *See* 5 U.S.C. § 4703; *Smatlwood v. Department of the Navy*, 52 M.S.P.R. 678, 682 (1992). *Also see generally*

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[15] IAF-172, Tab 20, at 2-3.

[16] IAF-496, Tab 1, at 12-13; *id.*, appeal form at blocks 12., 27, 30.b.; *id.*, form SF-50, approved May 8, 2000. With regard to action (2), *see id.*, attachment sheets at 45-50, 57.

Kohfield v. Department of the Navy. 75 M.S.P.R. 1, 4-6 (1997). I therefore found that the appellant had not yet alleged facts which, if proven, would show that the "contribution score" itself was a personnel action, for WPA purposes, and ordered him to show cause why this aspect of his claim should not be dismissed without a hearing.[17]

Both parties responded to the order, and in so doing, the agency provided uncontradicted evidence that OPM had waived Chapter 43 of title 5 as to the demonstration project in question, and thus, the "contribution score" was not governed by Chapter 43.[18] I found, however, that it could still arguably be a "decision concerning pay [or] benefits." *See* 5 U.S.C. § 2302(a)(2)(A)(ix). I therefore concluded that all three actions could, if proven, constitute covered personnel actions, and ordered a hearing as to all three.[19]

OSC Exhaustion

To satisfy the exhaustion requirement of 5 U.S.C. § 1214(a)(3) in an IRA appeal, an appellant must inform OSC of the precise ground of his charge of whistleblowing, giving OSC a sufficient basis to pursue an investigation which might lead to corrective action. *Ward v. Merit Systems Protection Board*, 981 F.2d 521, 526 (Fed. Cir. 1992).

Initially, I found that all of the disclosures and actions discussed above were mentioned in the appellant's submission to OSC in May 2000; however, it was unclear whether some of them - e.g., the "first item" allegedly disclosed to Mr. Pope in late 1994 - were explained clearly enough to satisfy the exhaustion requirement. I therefore

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[17] IAF-172, Tab 6, at 5.

[18] *Id.*, Tab 14, at 4-5.

[19] *Id.*, Tab 20, at 2.

notified the appellant that unless he showed by preponderant evidence that he gave OSC a sufficient basis to investigate these claims, they would be dismissed for failure to exhaust his OSC remedy. Accordingly, I ordered him to show cause why this should not occur.[20]

In response, the appellant stated only that he had previously filed with the Board "his entire OSC submittal of approximately 130 pages... ."[21] Based on my review of that document, which was attached to the appellant's initial petition for appeal, I found as follows.

At section 13 of his form OSC-11, the appellant cites a disclosure to Luke Pope "on or about 11/95," which he describes as follows:

> During the month of November, 1995, in the presence of Tim Schalfant..., Rhonda Tenderhawt (sp?)... and Gail Nusz... Colonel Nusz made an inappropriate remark to the effect that [the appellant's] working habits were degraded to which [the appellant] informed Colonel Nusz that he objected. Colonel Nusz initially denied making the remark. Walt Lipe, [the appellant]'s supervisor at the time, and [the appellant] went the next day to Colonel Nusz' office and demanded an apology. Colonel Nusz DID apologize but did not forget the episode. [The appellant] believes that Colonel Nusz' remark was in response to [the appellant]'s formal objection to the Civilian Personnel Office over the selection of the "new" candidate for the B-1 Project lead.

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[20] *Id.*, Tab 6, at 5-6.

[21] *Id.*, Tab 15, at 2.

At "Attachment 3" to this form the appellant adds, "The entire program of routine discrimination against complainant began when he suggested that the Personnel Office used an improper selection process in filling the Lead Position for the B-1 Program."[22]

Based on the foregoing, I found that the appellant had exhausted his OSC remedy with respect to his 1995 disclosures, in that he provided a reasonable starting point for an investigation into alleged reprisal for disclosures concerning the B-1 selection. *Ward*, 981 F.2d at 526. I found that the same was true of the his complaints about the demonstration project, which were evidenced in letters and grievances attached to his OSC filing.[23]

With respect to the appellant's alleged disclosures concerning timekeeping irregularities, I could find only one reference to this event, which has already been quoted: "In late 1994 and 1995 I made two verbal reports to Mr. Luke Pope for his agency to investigate. The first item involved a person's time at work... ."[24] I found that this was too vague to give OSC a basis on which to investigate his claim, and that the appellant had not alleged facts which, if proven, would show that he exhausted his OSC remedy in this respect.[25] *Id.*; *Ellison v. Merit Systems Protection Board*, 7 F.3d 1031, 1036 (Fed. Cir. 1993) ("[T]he test of the sufficiency of an employee's charges of whistleblowing to the OSC is the statement that the employee makes in the complaint requesting corrective action under 5 U.S.C. § 1214, not the employee's post hoc characterization of those statements.")

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[22] IAF-496, Tab 1, at 17-19.

[23] IAF-172, Tab 20, at 4.

[24] IAF-496, at 12-13 (letter from appellant to OSC dated May 15, 2000).

[25] IAF-172, Tab 20, at 4.

Summary: Non-Frivolous Claims

For all of the reasons just explained, I informed the parties that I would conduct a hearing only on matters which, if proven, would fall within the Board's jurisdiction, *see Embree*, 70 M.S.P.R. at 84; and that those matters, were as follows:

> (a) Whether the appellant made a protected disclosure to Luke Pope in approximately 1995, about the fact that the agency filled the Lead Position for the B-1 Program without posting a vacancy, allegedly in violation of agency selection procedures?
>
> (b) Whether covered personnel actions took place, when the agency allegedly
>
> > (1) reassigned the appellant from the position of Computer Specialist, NH-0334-III, to that of Computer Specialist (Programmer Analyst), NH-0334-III, in or about May 2000;
> >
> > (2) issued a lowered "contribution score" for 1999, allegedly resulting in loss of pay; and
> >
> > (3) denied a further pay increase that the appellant allegedly would have received in April 2000?
>
> (c) Whether the officials who took the alleged personnel actions just listed had actual or constructive knowledge of the appellant's alleged disclosure in 1995, and if

so, whether the disclosure contributed to one or more of the actions?

(d) Whether the agency would have taken the same actions, or any of them, despite the appellant's 1995 disclosure?[26]

After the appellant waived his right to a hearing, I provided the parties with an opportunity to make additional, evidentiary submissions on these issues. Both made timely submissions, and the record is now closed.[27]

The appellant has not shown that the Board has IRA jurisdiction in this matter.

The agency agrees, and I find, that the personnel actions in question took place as alleged by the appellant.[28] For reasons stated above, I find that all were "personnel actions" within the meaning of 5 U.S.C. § 2302(a)(2), that were taken after the effective date of the WPA. I find further that those three actions, and his alleged disclosure to Mr. Pope in 1995 concerning selection procedures, were all raised previously with OSC. Thus, to complete his proof of IRA jurisdiction the appellant must show that he did, in fact, make such a disclosure, and that it was protected under the WPA. *Geyer*, 63 M.S.P.R. at 16-17.

The appellant's final submission consists of legal argument supported by transcripts of the depositions of

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[26] *Id.*, at 5.

[27] *Id.*, Tabs 29 - 31. I have also accepted and considered an amendment received from the agency shortly after the record closed, correcting typographical errors in its timely submission. *Id.*, Tab 32.

[28] *Id.*, Tab 30, at 2.

three witnesses.[29] The appellant himself did not provide a statement; however, the unsworn assertions in his initial appeal are admissible evidence, and are considered as well. *See Scott v. Department of Justice*, 69 M.S.P.R. 211, 228 (1995), *aff'd*, 99 F.3d 1160 (Fed. Cir. 1996) (Table).

Deponent Dale Taft testified that in approximately 1995 he and the appellant spoke generally with Mr. Pope about the fact that the position in question was to be filled without formally posting a vacancy. Mr. Taft cannot recall how many times this occurred, or any specific details about these conversation(s). He also vaguely recalls the appellant telling him later that the appellant had spoken again with Mr. Pope regarding this same issue.[30] The appellant does not describe these conversations, stating only that he once lodged an "objection to the Civilian Personnel Office over the selection of the 'new' candidate for the B-1 Project lead," and "suggested that the Personnel Office used an improper selection process in filling the Lead Position for the B-1 Program."[31] Mr. Pope testified that he has no recollection of such conversations, but it is not impossible that they took place.[32]

Based on the foregoing I find that, more likely than not, the appellant and Mr. Taft both complained to Mr. Pope about the selection process in approximately 1995. As to the substance of these complaints, Mr. Taft testified, "Word came down this [selection] was going to happen. Then an e-mail went out, through the entire group on base that they were taking applications for this position." When asked whether there was "any posting of the position being

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[29] *Id.*, Tab 31.

[30] *Id.*, Exhibit A, at 22-24.

[31] IAF-496, Tab 1, attachments at 17, 19.

[32] IAF-172, Tab 31, Exhibit B, at 14-15, 18, 23-24.

opened," Mr. Taft replied, "Official posting, no," but added, "Now, I have to admit, I didn't go searching the websites to look for the posting... ."[33] Again, the appellant himself provides no details.

To determine whether a protected disclosure occurred, "the proper test is... Could a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably conclude that the actions of the government evidence" one of the types of wrongdoing described in 5 U.S.C. § 2302(b)(8), e.g., a violation of law, rule or regulation? *LaChance v. White,* 174 F.3d 1378, 1381 (Fed. Cir. 1999), *cert. denied,* 120 S. Ct. 1157 (Feb. 22, 2000). By definition, a demonstration project operates under a specialized set of personnel procedures that do not necessarily apply elsewhere in federal service. *See Kohfield,* 75 M.S.P.R. at 4-5. The appellant has not identified any specific rule or regulation, applicable to the demonstration project in question, that would prohibit management from soliciting applications for a vacant position via e-mail or Internet ("website") postings, rather than a paper vacancy announcement; nor has he provided evidence to show that he reasonably believed, at the time, that this practice evidenced such a violation. *See, e.g., Ganski,* 86 M.S.P.R. at 35. He therefore has not borne his burden of proving either that a protected disclosure occurred, or that IRA jurisdiction exists. Accordingly, the appeal must be dismissed.[34] *Geyer,* 63 M.S.P.R. at 16-17.

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[33] *Id.*, Exhibit A, at 19-20.

[34] I would reach the same result under *Yunus* because, for reasons explained below, the appellant has neither alleged nor proven facts sufficient to establish that his disclosures in 1995 contributed to any of the actions under appeal. *Yunus,* 242 F.3d at 1371-72.

Even if the Board had jurisdiction over these claims, the appellant has not shown that he is entitled to corrective action.

Even if jurisdiction were established, the appellant would be entitled to corrective action only if he had shown by preponderant evidence that the disclosure in question was a contributing factor in the actions under appeal. *See Morton v. Department of the Navy*, 66 F.3d 279, 283-84 (Fed. Cir. 1995), *cert. denied*, 116 S. Ct. 1271 (1996); *clarified in Huffman, supra.* To do so he was required to prove, inter alia, that the official taking the action had actual or constructive knowledge of the disclosure. *Easterbrook* v. *Department of Justice*, 85 M.S.P.R. 60, 65-66 (2000).

In this regard, the appellant offers only the testimony of Mr. Taft, who states as follows:

> Q ...[W]hat was the reaction [to the appellant's complaint(s) about selection procedures]?
>
> A It was a pot stir, trouble maker, they weren't very appreciative.
>
> Q Was there anybody in your chain of command who said things like that?
>
> A I remember references made to [the appellant] causing trouble. I honestly can't remember who said them.
>
> Q What about outside your chain of command in [the appellant's] chan of command at that time?

A Well, in that time frame our chain of command was one of the same. Our supervisor was essentially the same person.

Q Lipe?

A Lipe or Chalfant.

Q What information did you get to lead you to believe that they kind of assume him as a pot boiler or trouble maker?

A Just casual comments.

Q Made by whom?

A I can't remember exactly who it was. It was in a management chain, but I don't remember exactly who it was, whether it was Lipe or Chalfant or Sakahara. I can't testify to who it was. I don't remember the specific detail of who said that sort of thing. I just remember general comments being made... .[35]

Based on this testimony the appellant maintains that Mr. Chalfant had actual knowledge of the 1995 disclosure, when he and 7 other members of a "sub-pay panel" determined the appellant's "contribution score" for 1999, resulting in denial of a pay increase.[36] The agency submits sworn affidavits from Mr. Chalfant, the other panel members, and the official who approved their findings, all of whom specifically deny such knowledge.[37] I find that Mr.

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[35] IAF-172, Tab 31, Exhibit A, at 30-31.

[36] *Id.*, argument at 6.

[37] *Id.*, Tab 30, Agency Exhibits 4, 6-12.

Taft's vague and unspecific testimony is not sufficient to rebut these denials. The appellant has therefore failed to show that any official who took part in assigning the contribution score had actual knowledge of his disclosures, or was influenced by one who did. Accordingly, the appellant has not shown that his disclosures contributed to that action. *Easterbrook*, 85 M.S.P.R. at 65-66.

Likewise, the agency submits the affidavits of Gary Johnson and Jan Taylor, who state without contradiction that they are the officials who took the reassignment action in question, and when they did so they had no knowledge of the appellant's 1995 disclosure concerning selection procedures.[38] The appellant submitted nothing to rebut this, and therefore failed to show that his disclosure contributed to that action. *Id.*

With regard to the denial of a pay increase in April 2000: Demonstration project chief Brandt Taylor explains that had the appellant remained a general schedule employee he would have received a within-grade increase at that time; however, as a member of the demonstration project he was no longer entitled to such increases. Thus, the loss of a pay increase in April 2000 did not arise out of any separate decision, but was a consequence of the demonstration project itself.[39] The appellant has thus failed to show that any person with actual knowledge of his 1995 disclosure took or influenced that action. *Id.*

For these reasons, I find that the appellant failed to show that his 1995 disclosure concerning selection procedures contributed to any of the actions under appeal. Accordingly, I would deny corrective action, even if jurisdiction had been shown. *See Horton*, 66 F.3d at 283-84.

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[38] *Id.*, Agency Exhibits 4, 5.

[39] *Id.*, Agency Exhibit 14, at 2.

DECISION

The appellant's request for corrective action is DISMISSED.

FOR THE BOARD:

/s/ Philip D. Reed
Philip D. Reed
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **November 7, 2001**, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.,
Washington, DC 20419

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be postmarked, faxed, or hand-delivered no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you fail to provide a statement with your petition that you have either

mailed, faxed, or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

CERTIFICATE OF SERVICE

I certify that the attached Document (s) was (were) sent by regular mail, unless otherwise indicated below, this day to each of the following:

Appellant
Reginald L. Cyrus
9748 Irene Avenue
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(DATE)

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5 U.S.C.A. § 7701

UNITED STATES CODE ANNOTATED
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES

PART III__EMPLOYEES

SUBPART F__LABOR_MANAGEMENT AND EMPLOYEE RELATIONS

CHAPTER 77__APPEALS

§ 7701. Appellate procedures

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right__

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

(b)(1) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after

opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

(2)(A) If an employee or applicant for employment is the prevailing party in an appeal under this subsection, the employee or applicant shall be granted the relief provided in the decision effective upon the making of the decision, and remaining in effect pending the outcome of any petition for review under subsection (e), unless__

(i) the deciding official determines that the granting of such relief is not appropriate; or

(ii)(I) the relief granted in the decision provides that such employee or applicant shall return or be present at the place of employment during the period pending the outcome of any petition for review under subsection (e); and

(II) the employing agency, subject to the provisions of subparagraph (B), determines that the return or presence of such employee or applicant is unduly disruptive to the work environment.

(B) If an agency makes a determination under subparagraph (A)(ii)(II) that prevents the return or presence of an employee at the place of employment, such employee shall receive pay, compensation, and all other benefits as terms and conditions of employment during the period pending the outcome of any petition for review under subsection (e).

(C) Nothing in the provisions of this paragraph may be construed to require any award of back pay or attorney fees be paid before the decision is final.

(3) With respect to an appeal from an adverse action covered by subchapter V of chapter 75, authority to mitigate the personnel action involved shall be available, subject to the same standards as would apply in an appeal involving an action covered by subchapter II of chapter 75 with respect to which mitigation authority under this section exists.

(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision__

(A) in the case of an action based on unacceptable performance described in section 4303, is supported by substantial evidence; or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment__

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

(C) shows that the decision was not in accordance with law.

(d)(1) In any case in which__

(A) the interpretation or application of any civil service law, rule, or regulation, under the jurisdiction of the Office

of Personnel Management is at issue in any proceeding under this section; and

(B) the Director of the Office of Personnel Management is of the opinion that an erroneous decision would have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office;

the Director may as a matter of right intervene or otherwise participate in that proceeding before the Board. If the Director exercises his right to participate in a proceeding before the Board, he shall do so as early in the proceeding as practicable. Nothing in this title shall be construed to permit the Office to interfere with the independent decisionmaking of the Merit Systems Protection Board.

(2) The Board shall promptly notify the Director whenever the interpretation of any civil service law, rule, or regulation under the jurisdiction of the Office is at issue in any proceeding under this section.

(e)(1) Except as provided in section 7702 of this title, any decision under subsection (b) of this section shall be final unless__

(A) a party to the appeal or the Director petitions the Board for review within 30 days after the receipt of the decision; or

(B) the Board reopens and reconsiders a case on its own motion.

The Board, for good cause shown, may extend the 30_day period referred to in subparagraph (A) of this paragraph. One member of the Board may grant a petition or otherwise direct that a decision be reviewed by the full Board. The preceding sentence shall not apply if, by law, a decision of

an administrative law judge is required to be acted upon by the Board.

(2) The Director may petition the Board for a review under paragraph (1) of this subsection only if the Director is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office.

(f) The Board, or an administrative law judge or other employee of the Board designated to hear a case, may__

(1) consolidate appeals filed by two or more appellants, or

(2) join two or more appeals filed by the same appellant and hear and decide them concurrently,

if the deciding official or officials hearing the cases are of the opinion that the action could result in the appeals' being processed more expeditiously and would not adversely affect any party.

(g)(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

(2) If an employee or applicant for employment is the prevailing party and the decision is based on a finding of

discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e_5(k)).

(h) The Board may, by regulation, provide for one or more alternative methods for settling matters subject to the appellate jurisdiction of the Board which shall be applicable at the election of an applicant for employment or of an employee who is not in a unit for which a labor organization is accorded exclusive recognition, and shall be in lieu of other procedures provided for under this section. A decision under such a method shall be final, unless the Board reopens and reconsiders a case at the request of the Office of Personnel Management under subsection (e) of this section.

(i)(1) Upon the submission of any appeal to the Board under this section, the Board, through reference to such categories of cases, or other means, as it determines appropriate, shall establish and announce publicly the date by which it intends to complete action on the matter. Such date shall assure expeditious consideration of the appeal, consistent with the interests of fairness and other priorities of the Board. If the Board fails to complete action on the appeal by the announced date, and the expected delay will exceed 30 days, the Board shall publicly announce the new date by which it intends to complete action on the appeal.

(2) Not later than March 1 of each year, the Board shall submit to the Congress a report describing the number of appeals submitted to it during the preceding fiscal year, the number of appeals on which it completed action during that year, and the number of instances during that year in which it failed to conclude a proceeding by the date originally announced, together with an explanation of the reasons therefor.

(3) The Board shall by rule indicate any other category of significant Board action which the Board determines should be subject to the provisions of this subsection.

(4) It shall be the duty of the Board, an administrative law judge, or employee designated by the Board to hear any proceeding under this section to expedite to the extent practicable that proceeding.

(j) In determining the appealability under this section of any case involving a removal from the service (other than the removal of a reemployed annuitant), neither an individual's status under any retirement system established by or under Federal statute nor any election made by such individual under any such system may be taken into account.

(k) The Board may prescribe regulations to carry out the purpose of this section.